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SUPREME COURT, U.S.

No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners,

v.

NORMAN L. LONGVAL,

Respondent

On Petition for Certiorari to the United States Court of Appeals for the First Circuit

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RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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NORMAN L. LONGVAL,

Respondent

Respondent's Opposition to Petition for Certiorari

Respondent Norman Longval urges that certiorari not be granted, for the following reasons.

Statement of the Case: Omitted Facts

The Statement in the Petition does not state the Court of Appeals' grounds for holding Respondent Longval's sentence unconstitutional. That court (composed of Chief Judge Coffin and Judges Aldrich and Bownes) relied on the principle that "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Pet. App. B., p. 4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). The Court of Appeals, in brief, held that Longval received an unusually long prison term because he rejected the trial judge's call that he surrender his right to be tried before being sentenced. It noted that during his trial, before Longval had an opportunity to present evidence, "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 3, 5-6.* Longval did not plead guilty but admitted his guilt on the stand and was convicted (Pet. App. C, p. 11).

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* The trial judge's words, as found by the state court, may be found at Pet. App. D, pp. 6-7, in the Petition at pages 6-7, and at page 5 of this Opposition. Longval's counsel reported the judge's words to Longval. Pet. App. D, pp. 9-10.

The judge, who had "strongly suggest[ed]" a plea (Pet. App. D, p. 6) then gave Longval sentences amounting to forty to fifty years in Walpole State Prison (Pet. App. C, p. 3). On these facts, the Court of Appeals accepted the state court's findings that the trial judge spoke without improper intent, but held that his words nevertheless created "a reasonable apprehension of vindictiveness" which unconstitutionally tainted the sentence, and required resentencing (Pet. App. B, pp. 6-7).

The Court of Appeals further explained its reasoning after this Court remanded for reconsideration in light of United States v. Goodwin, 102 S.Ct. 2495 (1982). It stated that:

> We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The Court clarified the limits of its holding by noting that "The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference" (Pet. App. A, p. 5)* and distinguished "this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining." (Pet. App. A, p. 10). The Court of Appeals emphasized that the trial judge's forty to fifty year sentence had exceeded the statutory maximum,** that Longval's codefendant who pleaded guilty received a prison sentence of only three years (followed by three years probation), that the trial judge gave no explanation for his sentence, and that the judge imposed consecutive sentences for charges basically included in the same offense (Pet. App. A, pp. 6-8). (All the charges arouse out of the same pharmacy robbery, during which no one was injured. Pet. App. C, pp. 6-7, 10-11). The Court of Appeals noted that the Commonwealth, in its

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* There was no plea bargaining involving Longval at any time (Pet. App. A, p. 3; App. D, p. 9).

** The Massachusetts Appellate Division later reduced Longval's sentence to thirty to forty years; the Petition does not contest the Court of Appeals' conclusion that this does not wipe out any original violation (Pet. App. B, pp. 2, 7).

previous petition for certiorari which led to the remand, had "seized upon" a "collateral remark" in the Court of Appeals' previous opinion, presenting to this Court an issue not really present in the case (Pet. App. A, pp. 2-3).

Summary of Argument

The Court of Appeals fully accepted the state courts' assertion that the trial judge's comments urging Longval to plead guilty or face a "substantial prison sentence" were not a "threat." The Court was thus in full accord with Sumner v. Mata, 449 U.S. 539 (1981). The Court's construction of the state courts' statement that there was no "threat" as meaning that the judge had no improper intent was also warranted. Even were it not, the only alternative reading would be that the judge's comments were not unconstitutionally coercive, which is a conclusion of law to which the Court of Appeals owed no deference. In any event, this Court should not grant certiorari just to consider whether the Court of Appeals correctly construed the state court opinions, particularly since the Petitioners failed to include that issue among the questions presented the last time they sought certiorari.

The issue which this Court remanded to the Court of Appeals for reconsideration--the applicability of United States v. Goodwin, 102 S.Ct. 2485 (1982) to this case--was correctly resolved below. That Court applied to the unusual facts of this case the rule recognized by Goodwin: that a defendant can establish a presumption that he was punished for asserting his rights by proving a "reasonable likelihood of vindictiveness" even though he cannot prove that the judge or prosecutor in question acted with actual vindictive intent. Here, the judge's uninvited assertion that failure to plead guilty could lead to a "substantial prison sentence" and the heavy sentence he ultimately imposed--a sentence larger than the statutory maximum, and fourteen to seventeen times as long as that received by a codefendant who pleaded guilty--amply demonstrated a reasonable likelihood of vindictiveness, particularly since the judge never provided any other explanation for his sentence. And the Court of Appeals' decision here that Longval should be resentenced by the state courts, unlike the relief this Court reversed in Goodwin, had no tendency to

prevent the guilty from being convicted or to interfere with the free play of the adversary system between prosecution and defense.

Argument

I. THE COURT OF APPEALS ACCEPTED ALL STATE COURT FACTUAL FINDINGS, AND THE PETITION'S CLAIM THAT IT DID NOT RAISES NO ISSUE WARRANTING CERTIORARI.

A) This Court Should Not Hear A Claim Which Petitioners Failed to Raise the Last Time They Sought Certiorari.

Petitioners did not ask this Court to consider their claim that the Court of Appeals violated Sumner v. Mata, 449 U.S. 539 (1981) when they last petitioned for certiorari in 1980. The Petitioners were well aware of that claim, since they mentioned it in their petition (pp. 9, 18), but they failed to include it among the questions presented for review. See Petition for Writ of Certiorari, Lawrence R. Meachum v. Norman L. Longval, No. 81-261, pp. i-ii. Still less did they mention their current claim (Pet., pp. 14-16) that the Court of Appeals somehow violated Donnelley v. De Christoforo, 416 U.S. 637 (1974). Indeed, they cited that case neither in their previous petition for certiorari, nor in either of their briefs before the Court of Appeals; their claim based on it is raised for the first time in this Court.

This Court should not welcome repeated, dilatory, unnecessary applications by state officials, any more than it has welcomed efforts by defense counsel or habeas corpus petitioners to reserve some of their claims for another effort. See Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (calling such tactics "sandbagging"); Rose v. Lundy, 102 S.Ct. 1198, 1204-05 (1982). Norman Longval has already served more than seven years (see Pet. App. C, p. 3) of a prison sentence which the Court of Appeals found unconstitutional. Relief may already have been delayed because the Petitioners, when they last sought certiorari, urged on this Court an issue not in fact raised by this case (Pet. App. A, pp. 2-4).*

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* As appears below, the Question Presented in the present Petition (p. i) is also one not present in the case. At no time did the Court of Appeals suggest or apply a test based on "a defendant's subjective perception of possible vindictiveness" (Pet., p. 1). Its test was wholly objective. See Part II(A) of this Opposition, page 8 below.

This Court should not entertain a second application--particularly one which raises no issue of general importance, but merely challenges a federal court's reading of particular state findings.

B) The Court of Appeals Followed Sumner v. Mata.

The Court of Appeals fully accepted the state court assertions that the trial judge's words urging Longval to plead guilty or face a "substantial prison sentence" (Pet. App. D, pp. 6-7) were not a "threat" (Pet. App. C, p. 15; App. D, p. 8):

> We readily accept the master's finding that the trial judge in this case acted with the best of intentions; ut we think it clear that, viewed from the crucial perspective of the defendant, the judge's statement could reasonably have been understood as a threat. Pet. App. B, pp. 6-7.

The Court repeatedly stated that its decision was not based on any improper ntent behind the judge's words but rather on the reasonable likelihood of vindictiveness they--and the ensuing prison sentence--presented to the reasonable observer (Pet. App. A, pp. 4-5; App. B, pp. 5-6). Since the Court accepted all state court findings, there could be no possible violation of Sumner v. Mata, 449 U.S. 539 (1981), or of the statute that case construed, 28 U.S.C. § 2254(d).*

The Court was plainly correct in construing the state opinion to refer at most to the trial judge's intention. The meaning of the trial judge's words is clear:

> Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. Pet. App. D, pp. 6-7 (bracketed explanations by state court master)

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* The Court willingly applied Sumner only a month before it decided this case, in another appeal raising similar issues. Koski v. Samaha, 648 F.2d 790, 880 (1st Cir. 1980).

By reading the state court opinions to say that no threat was intended, the Court of Appeals reconciled the state court Master's finding with the inescapable meaning of the words the Master had found were used by the trial judge. Indeed, the Master's statement was that nothing led him "to construe the Judge's remarks as in any sense a threat but merely as a staement to a young lawyer of the Judge's then general impression of the evidence" (Pet. App. D, p. 8). This is clearly an assertion about what the judge intended when he spoke during the trial. It is not even a statement about his intent when he imposed the sentence which the Court of Appeals held unconstitutional.

If anything, the Court of Appeals went too far in treating what the state courts said (Pet. App. C, pp. 15-16; App. D, p. 8) as a factual finding, rather than an assertion that the trial judge's language was not unconstitutionally coercive. Since there was no dispute that the trial judge said that, if Longval declined to plead guilty, he was "capable of" imposing "a substantial prison sentence" (Pet. App. D, pp. 6-7), the state courts' remarks were probably directed to whether such a statement was unconstitutionally coercive. If so, the federal courts owed them no deference because they were either conclusions of law or mixed questions of law and fact. Sumner v. Mata, 102 S.Ct. 1303 (1982); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-04 (1977).

The Court of Appeals' decision is just as consistent with Donnelly v. DeChristoforo, 406 U.S. 637 (1974) (cited by the Petition at 14-16) as it is with Sumner v. Mata. Donnelley establishes that a federal court has no power to set aside a state conviction because it considers the prosecutor's comment (even though followed by a curative instruction) improper, without a showing of fundamental error denying due process. Here, the Court of Appeals has not undertaken to regulate the details of a trial. It has rather found that Longval made out a case that he was punished, not just or committing a crime, but also for refusing to forego a trial. That this may not be done is not a novel notion, or one arising out of the Court of Appeals' own theories of fairness, but an established constitutional principle most recently upheld by this Court in United States v. Goodwin,

102 S.Ct. 2485 (1982). If a trial judge may add years or decades to a defendant's sentence because he persists in claiming constitutional rights, those rights will become meaningless indeed.

II. THE COURT OF APPEALS PROPERLY APPLIED UNITED STATES V. GOODWIN TO THE FACTS OF THIS CASE.

A) The Court of Appeals Properly Ruled That a Reasonable Likelihood of Vindictiveness Raises a Presumption of Unconstitutional Punishment, and Never Applied the Subjective Test Alleged by the Petition.

Under Goodwin, a defendant may use either of two ways to establish that he has been unconstitutionally punished for asserting his rights. First, he may show that a judge or prosecutor acted with the actual intention of punishing him. United States v. Goodwin, 102 S.Ct. 2485, 2494 2494 (1982). Second, even if there is no claim of "actual vindictiveness," he may establish a "presumption of vindictiveness" (102 S.Ct. at 2493) by showing "a reasonable likelihood of vindictiveness" (id. at 2489). Accord, Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 71 (1979). That is because "Motives are complex and difficult to prove" (102 S.Ct. at 2489). "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right . . . , due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 2489, quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

The Court of Appeals applied the second of these standards: it found "a reasonable likelihood of vindictiveness" in the circumstances of this case (Pet. App. A, p. 4).* And on remand it made clear that its previous references to a "reasonable apprehension of vindictiveness" (Pet. App. B, pp. 5-6) did not refer to a mere possibility, or a mere apprehension by a suspicious defendant (Pet. App. A, pp. 3-4). As the Court noted, the reasons for allowing a presumption of vindictiveness apply with particular force here:

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* The Commonwealth has never argued that, if there is a presumption of vindictiveness, it has been rebutted.

> A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted . . . , even of counsel were willing to suffer the reputation with the bench that this would be likely to give him, would impose an almost impossible burden. Pet. App. A, pp. 10-11.

And of course defendants are especially likely to be deterred from exercising their rights when punishment emanates from a judge, not just a prosecutor (Pet. App. B, p. 6).

Contrary to the Petition's assertion that the Court of Appeals thought that "a defendant's subjective perception of possible vindictiveness is the proper standard" (Pet., p. 1), the Court of Appeals adopted a wholly objective standard. From the outset, its concern was with whether the judge's "remarks could create a '*reasonable* apprehension of vindictiveness'" (Pet. App. B, p. 6; emphasis added), quoting *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974). On remand, it made clear that this also requires a "reasonable likelihood of vindictiveness" (Pet. App. A, p. 4), quoting *United States* v. *Goodwin*, 102 S.Ct. 2485, 2489 (1982). It said absolutely nothing about the defendant Longval's subjective perceptions. The issue tendered by the Petition (p. 1) is thus not present in this case--any more than was the issue tendered in the Petitioners' previous petition (Pet. App. A, pp. 2-4).

This case simply involves the application of a standard confirmed by this Court within the year to particular and unusual facts. There is no issue of general importance for this Court to review. And the facts, as will now be explained, strongly support the Court of Appeals' conclusion that a reasonable likelihood of vindictiveness has been shown.

B) The Facts Here Amply Establish a Reasonable Likelihood of Vindictiveness.

1. The trial judge's own words (Pet. App. D, pp. 6-7) clearly furnished reasonable grounds for a presumption that he was pursuing "a course of action whose objective is to penalize a person's reliance on his legal rights." *Goodwin*, 102 S.Ct. at 2488 n.4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363

(1978). As the Court of Appeals said: "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 5-6.

2. That the judge used words inappropriate for a judicial officer presiding over a criminal trial reinforces the appearance that punishment, not some more usual and proper function, was in question. This was not the case of a judge or prosecutor simply going about his necessary unctions. Here the judge abandoned his function of presiding impartially over the trial to call on the defendant to surrender his right to a trial or face "a substantial prison sentence" (Pet. App. D, p. 7). Such a call has a huge coercive potential and is in no way consistent with a judge's proper functions. The likelihood is the greater that it typically

improper purpose.

The circumstances of the judge's involvement powerfully support a presumption that the sentence was imposed because Longval declined to accept the judge's call to plead guilty. The judge intervened on his own initiative, there having been no previous plea bargaining involving Longval (Pet. App. D, p. 6). He intervened in the middle of the trial over which he was supposed to be presiding impartially. He spoke during the prosecution's case (Id. at 3), before he had even heard Longval's side of the story, or seen the probation report. He gave a specific example to show what he was "capable of doing" (Id. at 4).When such a judicial summons to plead guilty was not accepted,
little choice but to follow through with a heavy sentence.

To find vindictiveness reasonably probable in cases like this would in no way impinge on legitimate state interests. On the contrary, courts have not hesitated to condemn extraordinary conduct such as what occurred here.* Indeed, some jurisdictions have gone further in

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* E.g., State v. Benfield, 364 N.C. 74, 140 S.E.2d 706 (1965); People v. Clark, 515 P.2d 1241 (Colo. 1973); State v. Svoboda, 205 Neb. 175, 287 N.W.2d 41 (1980); Kelly v. State, 44 Ala. App. 307, 208 S.2d 217 (1968); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973).

restricting judicial involvement.*

3. The judge imposed a huge, forty to fifty year sentence for involvement in a drugstore robbery in which no one was injured--a sentence which forcefully suggests that special measures were being taken for special purposes. The sentences exceeded a statutory maximum. Pet. App. B, p. 2. It imposed consecutive terms for charges included in the main count. Pet. App. A, pp. 6-7. It was far larger than the average sentences which Massachusetts gives even to defendants with criminal records found guilty after trial of crimes of personal violence. Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Amer. Bar Found. Res. J. 881, 932 (rape, prior record: 10 years; assault and battery with deadly weapon, jury conviction, prior prison record: 8 years; sum of average for manslaughter and average for robbery, major record: 14 years). This was no mere denial of leniency to an uncooperative defendant, but a punishment of decades in prison.

That the judge sentenced Longval to spend more than thirteen times as many years in prison as his codefendant who pleaded guilty further buttresses the presumption that Longval was punished for claiming a trial, not just for committing a crime. Longval was sentenced to forty to fifty years in prison, Ellard to three years in a house of correction and three years of probation (Pet. App. B, p. 2). Discrepancies far smallher have prompted appellate courts to call for explanations. United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973); United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). Although Longval had a longer criminal record than Ellard, Ellard was no stranger to the courts. Ellard volunteered to participate in the robbery (Tr. 198-99), owned the gun (Tr. 201), and was apparently the person who fired it (E.g., Tr. 200-201). Yet the judge gave Longval a prison sentence 38 to 47 years longer than Ellard's.

A massive discrepancy like this one declares unequivocally that those who persist to exercise their rights will be punished. It coerces

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* E.g., Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); State v. Buckalew, 561 P.2d 289 (Alas. 1977); State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977); Regina v. Turner, (1970) 2 Q.B. 321 (C.A.) (England); Fed. R. Crim. P. 11(e)(1); A.B.A. Standards for Criminal Justice, Standard 14-3, 3(c-f) (2d ed. 1980).

the innocent as well as the guilty to plead guilty when the judge asks them. See United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981); McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887, 926-30 (1980). And the discrepancy was far larger than any valid state interest in encouraging guilty pleas could explain. Even the most dramatic reports on plea bargaining describe sentence ratios of about two or three to one between defendants conficted after trial and those pleading guilty.* The decades of additional imprisonment heaped on Longval served no valid state purpose, and can only be construed as punishment for insisting that he be tried before being sentenced.

4. The nonpunitive ground traditionally invoked to justify longer sentences for those who do not plead guilty is absent from this case. Longval freely admitted his guilt on the stand (Pet. App. C, p. 11). He showed that he was like a defendant "who demonstrates by this plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over shorter periods of time than might otherwise be necessary." Brady v. United States, 397 U.S. 742, 753 (1970). The judge's sentence cannot therefore be explained on the theory that one who admits guilt deserves a lesser sentence than one who falsely denies it. Indeed, Longval's admissions were particularly sincere because they were made without a bargain, solely to establish the innocence of his codefendant Golden (who was then acquitted; Pet. App. C, p. 3). Most plea bargaining defendants, by contrast, admit their guilt only for the purpose of the bargain, and deny it again afterwards. A. Blumberg, Criminal Justice 89-91 (1967). There is thus a reasonable likelihood that the judge imposed a huge sentence, not because Longval was unwilling to admit his deeds, but because he was unwilling to surrender his right to a trial.

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* Zeisel, The Disposition of Felony Arrests, 1981 Amer. Bar Found. Res. J. 407, 448-49; Uhlman & Walker, "He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323, 328 (1980); Admin. Office of the U.S. Courts, Federal Offenders in the United States District Courts, 1971, at 13 (1973); Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Justice 27, 32 (1973); Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 U. Cin. L. Rev. 597, 609 (1973).

5. The powerful evidence of punishment in this record is wholly unrebutted by anything said by the trial judge. The judge gave no explanation whatever for the sentence (Tr. 280-82). That is, he gave no explanation except for his original statement during the trial, warning that, if there were no plea and Longval was convicted, he "might be disposed to impose a substantial prison sentence" (Pet. App. D, pp. 6-7). A reasonable observer could scarcely help concluding that the judge did what he said he would do.

C. The Practical Considerations Supporting This Court's Goodwin Decision Are Absent Here.

The decision which this Court reversed in Goodwin would have seriously obstructed the conviction of the guilty. The Court of Appeals there held that a prosecutor could not bring a new charge after a defendant claimed a jury trial unless she could educe objective evidence that the charge could not have been brought before. 102 S.Ct. at 2488. That would "block a legitimate response to criminal conduct." 102 S.Ct. at 2489. And it would encourage prosecutors to assert every charge in the book at the outset, regardless of the warrant for it, lest they be later barred from adding new charges. Id. at 2493 n.14.

This case involves no such problem. The Court of Appeals' decision does not require the abandonment of a charge of which Longval is guilty, but only that he be resentenced to whatever term the state courts think is appropriate, eithout punishment for his insistence on being tried. And even this mild remedy can be avoided in the future if judges refrain from extraordinary proposals such as the one advanced during Longval's trial.

Goodwin also threatened an unwarranted incursion on pretrial give and take, including but not limited to plea bargaining. As this Court noted, pretrial negotiation and changes of position among opposing counsel are routine. They warrant no inference of punishment, improve the administration of justice, and often benefit defendants. 102 S.Ct. at 2491-93. Treating such interplay between equals as punitive would without reason hamper the adversary system.

Again, this case is very different. A judge is not the equal of counsel in bargaining power. A judge is not supposed to participate in a

case as an adversary or negotiator. The middle of a trial--and still more so the sentencing hearing--is not the time for judicial maneuvering, but for judicial protection of the rights of all parties.

In Goodwin, lastly, there was no direct evidence that the prosecutor increased the charges because Goodwin claimed a jury trial, and much evidence that he did not. The prosecutor explained why he brought new charges. 102 S.Ct. at 2488 n.2. The original crime had been far more serious than the misdemeanor and petty offense charges originally brought: Goodwin had escaped from custody when a police officer was apparently on the verge of discovering evidence of major narcotics violations, in the process hitting the officer with his car and knocking him onto the highway. Later, Goodwin had apparently perjured himself at the preliminary hearing, and then absconded for three years. When, in the ordinary course of events, the case was assigned to a higher ranking attorney, there was no need to search for a punitive explanation for this attorney's decision to bring new charges raising the possible sentence from two and a third to fifteen years.* 102 S.Ct. at 2487-88 & n.2. What is surprising is that higher charges had not been brought long before.

In this case, by contrast, Longval received a huge sentence, for which the judge gave no contemporaneous or later explanation whatsoever. The only explanation the judge gave was his midtrial proposal that Longval plead guilty or face "a substantial prison sentence" (Pet. App. D, pp. 6-7). That statement provides precisely the direct evidence of a link between Longval's refusal to waive his rights and his sentence that was missing in Goodwin. See 102 S.Ct. at 2493. Together with the sentence later imposed and the other circumstances of the case, it provides ample support for the Court of Appeals' conclusion that Longval demonstrated a reasonable likelihood of vindictiveness.

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* The sentence actually imposed on Goodwin totalled six years. United States v. Goodwin, S.Ct. No. 80-2195, Joint Appendix at 7-8.

Conclusion

If a judge is free to initiate plea bargaining during trial, urge a defendant to plead guilty, announce that failure to do so will lead to a substantial sentence, and then condemn him to literally decades in prison, the constitutional right to be tried before being sentenced will be of little avail. The facts of this case leave little room for doubt that Norman Longval will be in prison for what may well be the rest of his life, not because he committed a crime, but because he thought he had constitutional rights.* Certainly there is a "reasonable likelihood" that this happened. The function of a federal habeas corpus court is precisely to grant relief in extraordinary cases such as this one, so that the promises of the Bill of Rights remain alive in the trial courts. And since the Court of Appeals applied to unusual facts precisely the standards which this Court has recognized in United States v. Goodwin and its precursors, this case poses no issue of general importance. This Court should therefore deny certiorari and let Longval be resentenced in the state courts to whatever term he may deserve, rather than accepting the Petition's bid to extend this litigation still further.

Respectfully submitted,

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* Longval will not be eligible for parole until he serves two thirds of his sentence, unless an improbable collection of officials unites to recommend it. Mass. G.L. c. 127, sec. 133(a). He was thirty-six years old when sentenced in 1975, seven years ago. Tr. 277-78.

No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners,

v.

NORMAN L. LONGVAL,

Respondent

On Petition for Certiorari to the United States Court of Appeals

for the First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-1157

In the Supreme Court of the United States

October Term, 1982

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Opposition to Petition for Certiorari

Respondent Norman Longval urges that certiorari not be granted, for the following reasons.

Statement of the Case: Omitted Facts

The Statement in the Petition does not state the Court of Appeals' grounds for holding Respondent Longval's sentence unconstitutional. That court (composed of Chief Judge Coffin and Judges Aldrich and Bownes) relied on the principle that "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." Pet. App. B., p. 4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). The Court of Appeals, in brief, held that Longval received an unusually long prison term because he rejected the trial judge's call that he surrender his right to be tried before being sentenced. It noted that during his trial, before Longval had an opportunity to present evidence, "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 3, 5-6.* Longval did not plead guilty but admitted his guilt on the stand and was convicted (Pet. App. C, p. 11).

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* The trial judge's words, as found by the state court, may be found at Pet. App. D, pp. 6-7, in the Petition at pages 6-7, and at page 5 of this Opposition. Longval's counsel reported the judge's words to Longval. Pet. App. D, pp. 9-10.

The judge, who had "strongly suggest[ed]" a plea (Pet. App. D, p. 6) then gave Longval sentences amounting to forty to fifty years in Walpole State Prison (Pet. App. C, p. 3). On these facts, the Court of Appeals accepted the state court's findings that the trial judge spoke without improper intent, but held that his words nevertheless created "a reasonable apprehension of vindictiveness" which unconstitutionally tainted the sentence, and required resentencing (Pet. App. B, pp. 6-7).

The Court of Appeals further explained its reasoning after this Court remanded for reconsideration in light of United States v. Goodwin, 102 S.Ct. 2495 (1982). It stated that:

> We fully accept the Court's guidance in Goodwin that recovery on the basis of a reasonable apprehension of vindictiveness also requires that the situation be one in which, in general, there is a "reasonable likelihood of vindictiveness," and we reaffirm our conclusion that this was such a situation.

The Court clarified the limits of its holding by noting that "The judge had not been asked by defense counsel for his views, nor were they interjected into any plea bargaining conference" (Pet. App. A, p. 5)* and distinguished "this case from one in which a judge merely inquired of counsel whether he had considered plea bargaining." (Pet. App. A, p. 10). The Court of Appeals emphasized that the trial judge's forty to fifty year sentence had exceeded the statutory maximum,** that Longval's codefendant who pleaded guilty received a prison sentence of only three years (followed by three years probation), that the trial judge gave no explanation for his sentence, and that the judge imposed consecutive sentences for charges basically included in the same offense (Pet. App. A, pp. 6-8). (All the charges arouse out of the same pharmacy robbery, during which no one was injured. Pet. App. C, pp. 6-7, 10-11). The Court of Appeals noted that the Commonwealth, in its

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* There was no plea bargaining involving Longval at any time (Pet. App. A, p. 3; App. D, p. 9).

** The Massachusetts Appellate Division later reduced Longval's sentence to thirty to forty years; the Petition does not contest the Court of Appeals' conclusion that this does not wipe out any original violation (Pet. App. B, pp. 2, 7).

previous petition for certiorari which led to the remand, had "seized upon" a "collateral remark" in the Court of Appeals' previous opinion, presenting to this Court an issue not really present in the case (Pet. App. A, pp. 2-3).

Summary of Argument

The Court of Appeals fully accepted the state courts' assertion that the trial judge's comments urging Longval to plead guilty or face a "substantial prison sentence" were not a "threat." The Court was thus in full accord with Sumner v. Mata, 449 U.S. 539 (1981). The Court's construction of the state courts' statement that there was no "threat" as meaning that the judge had no improper intent was also warranted. Even were it not, the only alternative reading would be that the judge's comments were not unconstitutionally coercive, which is a conclusion of law to which the Court of Appeals owed no deference. In any event, this Court should not grant certiorari just to consider whether the Court of Appeals correctly construed the state court opinions, particularly since the Petitioners failed to include that issue among the questions presented the last time they sought certiorari.

The issue which this Court remanded to the Court of Appeals for reconsideration--the applicability of United States v. Goodwin, 102 S.Ct. 2485 (1982) to this case--was correctly resolved below. That Court applied to the unusual facts of this case the rule recognized by Goodwin: that a defendant can establish a presumption that he was punished for asserting his rights by proving a "reasonable likelihood of vindictiveness" even though he cannot prove that the judge or prosecutor in question acted with actual vindictive intent. Here, the judge's uninvited assertion that failure to plead guilty could lead to a "substantial prison sentence" and the heavy sentence he ultimately imposed--a sentence larger than the statutory maximum, and fourteen to seventeen times as long as that received by a codefendant who pleaded guilty--amply demonstrated a reasonable likelihood of vindictiveness, particularly since the judge never provided any other explanation for his sentence. And the Court of Appeals' decision here that Longval should be resentenced by the state courts, unlike the relief this Court reversed in Goodwin, had no tendency to

prevent the guilty from being convicted or to interfere with the free play of the adversary system between prosecution and defense.

Argument

I. THE COURT OF APPEALS ACCEPTED ALL STATE COURT FACTUAL FINDINGS, AND THE PETITION'S CLAIM THAT IT DID NOT RAISES NO ISSUE WARRANTING CERTIORARI.

A) This Court Should Not Hear A Claim Which Petitioners Failed to Raise the Last Time They Sought Certiorari.

Petitioners did not ask this Court to consider their claim that the Court of Appeals violated Sumner v. Mata, 449 U.S. 539 (1981) when they last petitioned for certiorari in 1980. The Petitioners were well aware of that claim, since they mentioned it in their petition (pp. 9, 18), but they failed to include it among the questions presented for review. See Petition for Writ of Certiorari, Lawrence R. Meachum v. Norman L. Longval, No. 81-261, pp. i-ii. Still less did they mention their current claim (Pet., pp. 14-16) that the Court of Appeals somehow violated Donnelley v. De Christoforo, 416 U.S. 637 (1974). Indeed, they cited that case neither in their previous petition for certiorari, nor in either of their briefs before the Court of Appeals; their claim based on it is raised for the first time in this Court.

This Court should not welcome repeated, dilatory, unnecessary applications by state officials, any more than it has welcomed efforts by defense counsel or habeas corpus petitioners to reserve some of their claims for another effort. See Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (calling such tactics "sandbagging"); Rose v. Lundy, 102 S.Ct. 1198, 1204-05 (1982). Norman Longval has already served more than seven years (see Pet. App. C, p. 3) of a prison sentence which the Court of Appeals found unconstitutional. Relief may already have been delayed because the Petitioners, when they last sought certiorari, urged on this Court an issue not in fact raised by this case (Pet. App. A, pp. 2-4).*

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* As appears below, the Question Presented in the present Petition (p. i) is also one not present in the case. At no time did the Court of Appeals suggest or apply a test based on "a defendant's subjective perception of possible vindictiveness" (Pet., p. i). Its test was wholly objective. See Part II(A) of this Opposition, page 8 below.

This Court should not entertain a second application--particularly one which raises no issue of general importance, but merely challenges a federal court's reading of particular state findings.

B) The Court of Appeals Followed Sumner v. Mata.

The Court of Appeals fully accepted the state court assertions that the trial judge's words urging Longval to plead guilty or face a "substantial prison sentence" (Pet. App. D, pp. 6-7) were not a "threat" (Pet. App. C, p. 15; App. D, p. 8):

> We readily accept the master's finding that the trial judge in this case acted with the best of intentions; ut we think it clear that, viewed from the crucial perspective of the defendant, the judge's statement could reasonably have been understood as a threat. Pet. App. B, pp. 6-7.

The Court repeatedly stated that its decision was not based on any improper ntent behind the judge's words but rather on the reasonable likelihood of vindictiveness they--and the ensuing prison sentence--presented to the reasonable observer (Pet. App. A, pp. 4-5; App. B, pp. 5-6). Since the Court accepted all state court findings, there could be no possible violation of Sumner v. Mata, 449 U.S. 539 (1981), or of the statute that case construed, 28 U.S.C. § 2254(d).*

The Court was plainly correct in construing the state opinion to refer at most to the trial judge's intention. The meaning of the trial judge's words is clear:

> Mr. Primason, the evidence in this case as it is coming in is very serious, - robbery of a drug store, taking [i.e. theft of] drugs, use of a shot gun. I am wondering if you and the Commonwealth have had any discussion regarding a plea [of guilty]. I strongly suggest that you ask your client to consider a plea, because, if the jury returns a verdict of guilty, I might be disposed to impose a substantial prison sentence. You know that I am capable of doing that because you know of the sentences in a previous trial. Pet. App. D, pp. 6-7 (bracketed explanations by state court master)

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* The Court willingly applied Sumner only a month before it decided this case, in another appeal raising similar issues. Koski v. Samaha, 648 F.2d 790, 880 (1st Cir. 1980).

By reading the state court opinions to say that no threat was intended, the Court of Appeals reconciled the state court Master's finding with the inescapable meaning of the words the Master had found were used by the trial judge. Indeed, the Master's statement was that nothing led him "to construe the Judge's remarks as in any sense a threat but merely as a staement to a young lawyer of the Judge's then general impression of the evidence" (Pet. App. D, p. 8). This is clearly an assertion about what the judge intended when he spoke during the trial. It is not even a statement about his intent when he imposed the sentence which the Court of Appeals held unconstitutional.

If anything, the Court of Appeals went too far in treating what the state courts said (Pet. App. C, pp. 15-16; App. D, p. 8) as a factual finding, rather than an assertion that the trial judge's language was not unconstitutionally coercive. Since there was no dispute that the trial judge said that, if Longval declined to plead guilty, he was "capable of" imposing "a substantial prison sentence" (Pet. App. D, pp. 6-7), the state courts' remarks were probably directed to whether such a statement was unconstitutionally coercive. If so, the federal courts owed them no deference because they were either conclusions of law or mixed questions of law and fact. Sumner v. Mata, 102 S.Ct. 1303 (1982); Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); Brewer v. Williams, 430 U.S. 387, 397 n.4, 403-04 (1977).

The Court of Appeals' decision is just as consistent with Donnelly v. DeChristoforo, 406 U.S. 637 (1974) (cited by the Petition at 14-16) as it is with Sumner v. Mata. Donnelley establishes that a federal court has no power to set aside a state conviction because it considers the prosecutor's comment (even though followed by a curative instruction) improper, without a showing of fundamental error denying due process. Here, the Court of Appeals has not undertaken to regulate the details of a trial. It has rather found that Longval made out a case that he was punished, not just or committing a crime, but also for refusing to forego a trial. That this may not be done is not a novel notion, or one arising out of the Court of Appeals' own theories of fairness, but an established constitutional principle most recently upheld by this Court in United States v. Goodwin,

102 S.Ct. 2485 (1982). If a trial judge may add years or decades to a defendant's sentence because he persists in claiming constitutional rights, those rights will become meaningless indeed.

II. THE COURT OF APPEALS PROPERLY APPLIED UNITED STATES V. GOODWIN TO THE FACTS OF THIS CASE.

A) The Court of Appeals Properly Ruled That a Reasonable Likelihood of Vindictiveness Raises a Presumption of Unconstitutional Punishment, and Never Applied the Subjective Test Alleged by the Petition.

Under Goodwin, a defendant may use either of two ways to establish that he has been unconstitutionally punished for asserting his rights. First, he may show that a judge or prosecutor acted with the actual intention of punishing him. United States v. Goodwin, 102 S.Ct. 2485, 2494 2494 (1982). Second, even if there is no claim of "actual vindictiveness," he may establish a "presumption of vindictiveness" (102 S.Ct. at 2493) by showing "a reasonable likelihood of vindictiveness" (id. at 2489). Accord, Blackledge v. Perry, 417 U.S. 21 (1974); North Carolina v. Pearce, 395 U.S. 7[illegible] (1979). That is because "Motives are complex and difficult to prove" (102 S.Ct. at 2489). "And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right . . . , due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." Id. at 2489, quoting North Carolina v. Pearce, 395 U.S. 711, 725 (1969).

The Court of Appeals applied the second of these standards: it found "a reasonable likelihood of vindictiveness" in the circumstances of this case (Pet. App. A, p. 4).* And on remand it made clear that its previous references to a "reasonable apprehension of vindictiveness" (Pet. App. B, pp. 5-6) did not refer to a mere possibility, or a mere apprehension by a suspicious defendant (Pet. App. A, pp. 3-4). As the Court noted, the reasons for allowing a presumption of vindictiveness apply with particular force here:

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* The Commonwealth has never argued that, if there is a presumption of vindictiveness, it has been rebutted.

> A rule which required a defendant to make a prima facie case of actual vindictiveness on the part of a judge, which the Massachusetts court seemingly adopted . . . , even of counsel were willing to suffer the reputation with the bench that this would be likely to give him, would impose an almost impossible burden. Pet. App. A, pp. 10-11.

And of course defendants are especially likely to be deterred from exercising their rights when punishment emanates from a judge, not just a prosecutor (Pet. App. B, p. 6).

Contrary to the Petition's assertion that the Court of Appeals thought that "a defendant's subjective perception of possible vindictiveness is the proper standard" (Pet., p. i), the Court of Appeals adopted a wholly objective standard. From the outset, its concern was with whether the judge's "remarks could create a '<u>reasonable</u> apprehension of vindictiveness'" (Pet. App. B, p. 6; emphasis added), quoting <u>Blackledge</u> v. <u>Perry</u>, 417 U.S. 21, 28 (1974). On remand, it made clear that this also requires a "reasonable likelihood of vindictiveness" (Pet. App. A, p. 4), quoting <u>United States</u> v. <u>Goodwin</u>, 102 S.Ct. 2485, 2489 (1982). It said absolutely nothing about the defendant Longval's subjective perceptions. The issue tendered by the Petition (p. i) is thus not present in this case--any more than was the issue tendered in the Petitioners' previous petition (Pet. App. A, pp. 2-4).

This case simply involves the application of a standard confirmed by this Court within the year to particular and unusual facts. There is no issue of general importance for this Court to review. And the facts, as will now be explained, strongly support the Court of Appeals' conclusion that a reasonable likelihood of vindictiveness has been shown.

B) The Facts Here Amply Establish a Reasonable Likelihood of Vindictiveness.

1. The trial judge's own words (Pet. App. D, pp. 6-7) clearly furnished reasonable grounds for a presumption that he was pursuing "a course of action whose objective is to penalize a person's reliance on his legal rights." <u>Goodwin</u>, 102 S.Ct. at 2488 n.4, quoting Bordenkircher v. Hayes, 434 U.S. 357, 363

(1978). As the Court of Appeals said: "The court clearly implied to counsel that it might mete out a substantial prison sentence if Longval did not plead guilty; it pointedly referred to sentences imposed in a previous trial as examples of its capacity to do so." Pet. App. B, pp. 5-6.

2. That the judge used words inappropriate for a judicial officer presiding over a criminal trial reinforces the appearance that punishment, not some more usual and proper function, was in question. This was not the case of a judge or prosecutor simply going about his necessary unctions. Here the judge abandoned his function of presiding impartially over the trial to call on the defendant to surrender his right to a trial or face "a substantial prison sentence" (Pet. App. D, p. 7). Such a call has a huge coercive potential and is in no way consistent with a judge's proper functions. The likelihood is the greater that it typically

improper purpose.

The circumstances of the judge's involvement powerfully support a presumption that the sentence was imposed because Longval declined to accept the judge's call to plead guilty. The judge intervened on his own initiative, there having been no previous plea bargaining involving Longval (Pet. App. D, p. 6). He intervened in the middle of the trial over which he was supposed to be presiding impartially. He spoke during the prosecution's case (Id. at 3), before he had even heard Longval's side of the story, or seen the probation report. He gave a specific example to show what he was "capable of doing" (Id. at 4).When such a judicial summons to plead guilty was not accepted,
little choice but to follow through with a heavy sentence.

To find vindictiveness reasonably probable in cases like this would in no way impinge on legitimate state interests. On the contrary, courts have not hesitated to condemn extraordinary conduct such as what occurred here.* Indeed, some jurisdictions have gone further in

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* E.g., State v. Benfield, 364 N.C. 74, 140 S.E.2d 706 (1965); People v. Clark, 515 P.2d 1241 (Colo. 1973); State v. Svoboda, 205 Neb. 175, 287 N.W.2d 41 (1980); Kelly v. State, 44 Ala. App. 307, 208 S.2d 217 (1968); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973).

restricting judicial involvement.*

3. The judge imposed a huge, forty to fifty year sentence for involvement in a drugstore robbery in which no one was injured--a sentence which forcefully suggests that special measures were being taken for special purposes. The sentences exceeded a statutory maximum. Pet. App. B, p. 2. It imposed consecutive terms for charges included in the main count. Pet. App. A, pp. 6-7. It was far larger than the average sentences which Massachusetts gives even to defendants with criminal records found guilty after trial of crimes of personal violence. Zeisel & Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Amer. Bar Found. Res. J. 881, 932 (rape, prior record: 10 years; assault and battery with deadly weapon, jury conviction, prior prison record: 8 years; sum of average for manslaughter and average for robbery, major record: 14 years). This was no mere denial of leniency to an uncooperative defendant, but a punishment of decades in prison.

That the judge sentenced Longval to spend more than thirteen times as many years in prison as his codefendant who pleaded guilty further buttresses the presumption that Longval was punished for claiming a trial, not just for committing a crime. Longval was sentenced to forty to fifty years in prison, Ellard to three years in a house of correction and three years of probation (Pet. App. B, p. 2). Discrepancies far smallher have prompted appellate courts to call for explanations. United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973); United States v. Capriola, 537 F.2d 319 (9th Cir. 1976). Although Longval had a longer criminal record than Ellard, Ellard was no stranger to the court. Ellard volunteered to participate in the robbery (Tr. 198-99), owned the gun (Tr. 201), and was apparently the person who fired it (E.g., Tr. 200-201). Yet the judge gave Longval a prison sentence 38 to 47 years longer than Ellard's.

A massive discrepancy like this one declares unequivocally that those who persist to exercise their rights will be punished. It coerces

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* E.g., Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969); State v. Buckalew, 561 P.2d 289 (Alas. 1977); State v. Cross, 270 S.C. 44, 240 S.E.2d 514 (1977); Regina v. Turner, (1970) 2 Q.B. 321 (C.A.) (England); Fed. R. Crim. P. 11(e)(1); A.B.A. Standards for Criminal Justice, Standard 14-3, 3(c-f) (2d ed. 1980).

the innocent as well as the guilty to plead guilty when the judge asks them. See United States v. Porter, 513 F. Supp. 245 (M.D. Tenn. 1981); McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 Stan. L. Rev. 887, 926-30 (1980). And the discrepancy was far larger than any valid state interest in encouraging guilty pleas could explain. Even the most dramatic reports on plea bargaining describe sentence ratios of about two or three to one between defendants conficted after trial and those pleading guilty.* The decades of additional imprisonment heaped on Longval served no valid state purpose, and can only be construed as punishment for insisting that he be tried before being sentenced.

4. The nonpunitive ground traditionally invoked to justify longer sentences for those who do not plead guilty is absent from this case. Longval freely admitted his guilt on the stand (Pet. App. C, p. 11). He showed that he was like a defendant "who demonstrates by this plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over shorter periods of time than might otherwise be necessary." Brady v. United States, 397 U.S. 742, 753 (1970). The judge's sentence cannot therefore be explained on the theory that one who admits guilt deserves a lesser sentence than one who falsely denies it. Indeed, Longval's admissions were particularly sincere because they were made without a bargain, solely to establish the innocence of his codefendant Golden (who was then acquitted; Pet. App. C, p. 3). Most plea bargaining defendants, by contrast, admit their guilt only for the purpose of the bargain, and deny it again afterwards. A. Blumberg, Criminal Justice 89-91 (1967). There is thus a reasonable likelihood that the judge imposed a huge sentence, not because Longval was unwilling to admit his deeds, but because he was unwilling to surrender his right to a trial.

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* Zeisel, The Disposition of Felony Arrests, 1981 Amer. Bar Found. Res. J. 407, 448-49; Uhlman & Walker, "He Takes Some of My Time; I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323, 328 (1980); Admin. Office of the U.S. Courts, Federal Offenders in the United States District Courts, 1971, at 13 (1973); Shin, Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes, 1 J. Crim. Justice 27, 32 (1973); Cook, Sentencing Behavior of Federal Judges: Draft Cases--1972, 42 U. Cin. L. Rev. 597, 609 (1973).

5. The powerful evidence of punishment in this record is wholly unrebutted by anything said by the trial judge. The judge gave no explanation whatever for the sentence (Tr. 280-82). That is, he gave no explanation except for his original statement during the trial, warning that, if there were no plea and Longval was convicted, he "might be disposed to impose a substantial prison sentence" (Pet. App. D, pp. 6-7). A reasonable observer could scarcely help concluding that the judge did what he said he would do.

C. The Practical Considerations Supporting This Court's Goodwin Decision Are Absent Here.

The decision which this Court reversed in Goodwin would have seriously obstructed the conviction of the guilty. The Court of Appeals there held that a prosecutor could not bring a new charge after a defendant claimed a jury trial unless she could educe objective evidence that the charge could not have been brought before. 102 S.Ct. at 2488. That would "block a legitimate response to criminal conduct." 102 S.Ct. at 2489. And it would encourage prosecutors to assert every charge in the book at the outset, regardless of the warrant for it, lest they be later barred from adding new charges. Id. at 2493 n.14.

This case involves no such problem. The Court of Appeals' decision does not require the abandonment of a charge of which Longval is guilty, but only that he be resentenced to whatever term the state courts think is appropriate, without punishment for his insistence on being tried. And even this mild remedy can be avoided in the future if judges refrain from extraordinary proposals such as the one advanced during Longval's trial.

Goodwin also threatened an unwarranted incursion on pretrial give and take, including but not limited to plea bargaining. As this Court noted, pretrial negotiation and changes of position among opposing counsel are routine. They warrant no inference of punishment, improve the administration of justice, and often benefit defendants. 102 S.Ct. at 2491-93. Treating such interplay between equals as punitive would without reason hamper the adversary system.

Again, this case is very different. A judge is not the equal of counsel in bargaining power. A judge is not supposed to participate in a

case as an adversary or negotiator. The middle of a trial--and still more so the sentencing hearing--is not the time for judicial maneuvering, but for judicial protection of the rights of all parties.

In Goodwin, lastly, there was no direct evidence that the prosecutor increased the charges because Goodwin claimed a jury trial, and much evidence that he did not. The prosecutor explained why he brought new charges. 102 S.Ct. at 2488 n.2. The original crime had been far more serious than the misdemeanor and petty offense charges originally brought: Goodwin had escaped from custody when a police officer was apparently on the verge of discovering evidence of major narcotics violations, in the process hitting the officer with his car and knocking him onto the highway. Later, Goodwin had apparently perjured himself at the preliminary hearing, and then absconded for three years. When, in the ordinary course of events, the case was assigned to a higher ranking attorney, there was no need to search for a punitive explanation for this attorney's decision to bring new charges raising the possible sentence from two and a third to fifteen years.* 102 S.Ct. at 2487-88 & n.2. What is surprising is that higher charges had not been brought long before.

In this case, by contrast, Longval received a huge sentence, for which the judge gave no contemporaneous or later explanation whatsoever. The only explanation the judge gave was his midtrial proposal that Longval plead guilty or face "a substantial prison sentence" (Pet. App. D, pp. 6-7). That statement provides precisely the direct evidence of a link between Longval's refusal to waive his rights and his sentence that was missing in Goodwin. See 102 S.Ct. at 2493. Toghether with the sentence later imposed and the other circumstances of the case, it provides ample support for the Court of Appeals' conclusion that Longval demonstrated a reasonable likelihood of vindictiveness.

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* The sentence actually imposed on Goodwin totalled six years. United States v. Goodwin, S.Ct. No. 80-2195, Joint Appendix at 7-8.

Conclusion

If a judge is free to initiate plea bargaining during trial, urge a defendant to plead guilty, announce that failure to do so will lead to a substantial sentence, and then condemn him to literally decades in prison, the constitutional right to be tried before being sentenced will be of little avail. The facts of this case leave little room for doubt that Norman Longval will be in prison for what may well be the rest of his life, not because he committed a crime, but because he thought he had constitutional rights.* Certainly there is a "reasonable likelihood" that this happened. The function of a federal habeas corpus court is precisely to grant relief in extraordinary cases such as this one, so that the promises of the Bill of Rights remain alive in the trial courts. And since the Court of Appeals applied to unusual facts precisely the standards which this Court has recognized in United States v. Goodwin and its precursors, this case poses no issue of general importance. This Court should therefore deny certiorari and let Longval be resentenced in the state courts to whatever term he may deserve, rather than accepting the Petition's bid to extend this litigation still further.

Respectfully submitted,

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Counsel for Respondent Norman Longval

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* Longval will not be eligible for parole until he serves two thirds of his sentence, unless an improbable collection of officials unites to recommend it. Mass. G.L. c. 127, sec. 133(a). He was thirty-six years old when sentenced in 1975, seven years ago. Tr. 277-78.

ORIGINAL

No. 82-1157

In the Supreme Court of the United States

October Term, 1982

RECEIVED
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SUPREME COURT, U.S.

LAWRENCE R. MEACHUM, et al.,

Petitioners

v.

NORMAN L. LONGVAL,

Respondent

Respondent's Motion for Leave to Proceed in Forma Pauperis

Pursuant to Supreme Court Rule 46, Respondent Norman L. Longval moves for leave to proceed in forma pauperis, without prepayment of fees or costs and without printing his brief. In support of this motion, the undersigned represents: that Respondent was allowed to proceed in forma pauperis in the U.S. District Court for the District of Massachusetts, in the U.S. Court of Appeals for the First Circuit, and in this Court on a previous petition for certiorari (No. 81-261); that the undersigned was appointed by the Court of Appeals to represent Respondent, and is doing so without fee; and that the Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

John Leubsdorf
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-4420

Counsel for Respondent

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE

TO APPEAL IN FORMA PAUPERIS

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE R. MEACHUM

v.

NORMAN L. LONGVAL

Affidavit in Support of Motion to Proceed in Forma Pauperis

I, Norman Longval, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor or to print my brief, I state that because of my poverty I am unable to pay the costs of proceeding in this Court or to give security therefor; that I believe I am entitled to redress; and that I desire to oppose the petition for certiorari in this case and the petitioner's claims there presented, for reasons set forth in my brief in opposition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? NO — A PRISONER

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

   a. If the answer is yes, state the total value of the items owned. Approx $35.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? N/O

   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Norman Longval

SUBSCRIBED AND SWORN TO before me this _____ of December, 1982

Notary Public

Arthur D. Gauthier
Notary Public